

ERIC L. PRICE
JAMES C. THOMAS

IBLA 88-373

Decided October 4, 1990

Appeal from a decision of the California State Director, Bureau of Land Management, affirming the El Centro Area Manager's rejection of a plan of operations. CAMC 167520 through CAMC 167527.

Affirmed.

1. Federal Land Policy and Management Act of 1976: California Desert Conservation Act--Federal Land Policy and Management Act of 1976: Plan of Operations

When BLM rejects a plan of operations affecting lands in the California Desert Conservation Area because the proposed activity will result in unnecessary or undue degradation of the affected lands, and will result in the undue impairment of the scenic, scientific, and environmental values of those lands, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

APPEARANCES: Eric L. Price, Lakewood, California, and James C. Thomas, Mission Viejo, California, pro sese.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Eric L. Price and James C. Thomas have appealed from the December 2, 1987, decision of the California State Director, Bureau of Land Management (BLM), affirming the El Centro Area Manager's rejection of a mining plan of operations for the Peg Leg's Other Leg mining claims (CAMC 167520 through CAMC 167527), located in an unsurveyed area approximately 1 to 1.5 miles west of Indian Pass in projected secs. 19, 10, and 29, T. 13 S., R. 21 E., San Bernardino Meridian, Imperial County, California.

Appellants' mining claims lie within the California Desert Conservation Area (CDCA), as established pursuant to section 601 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781 (1982), which provides that "[t]he Secretary, in accordance with section 1712 of this title, shall prepare and implement a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the California Desert Conservation Area." 43 U.S.C. § 1781(d) (1982).
In

late 1980 and early 1981, the CDCA Plan was approved by two Secretaries of the Interior. This plan established land-use guidelines in concert with four multiple-use classes. The location of appellants' operation is within an area designated by BLM as "Class C," defined as an area which has been "preliminarily recommended as suitable for wilderness designation by Congress." See CDCA Plan at 13. The record shows this Class C area to be located outside of, but contiguous to, the Indian Pass Wilderness Study Area (WSA 355), which is also classified as Class C land. The status of the Class C area affected by appellants' plan of operations will be examined more closely infra.

In their mining plan of operations, dated January 30, 1987, appellants provided the following brief description of their proposed activities:

The project area shall follow the contour of the wash and all vegetative surfaces on or around the proposed access will be avoided when possible. The access road will be limited to moving aside large rock and boulders, fill areas, only when necessary, not to exceed 2 feet. Access will not disturb surface vegetation by cuts when possible, when necessary, cuts will not be more than 6 inches. This project consideration will be to avoid threatened vegetation in the access area.

By letter dated April 3, 1987, BLM informed Price that based upon a March 31, 1987, field examination, "there is insufficient information regarding the proposed operation to conduct a meaningful evaluation of impacts to the environment the activities might cause." BLM indicated that it needed "to know what type of equipment will be used, the number and types of samples to be taken, reclamation measures to be taken after sampling, and when the activities will take place and length of time it will take to accomplish this phase of mineral exploration," and directed Price's attention to 43 CFR 3809.1-5(b)(4)-(6). BLM stated that it deemed appellants' application to be incomplete and that no further processing of its plan would occur until it received the specified information. A second field examination, with both claimants and representatives of BLM present, took place on April 27, 1987, during which plans different from those submitted earlier were proposed by claimants and discussed.

By decision dated July 8, 1987, the El Centro Resource Area Manager, BLM, denied appellants' plan of operations. Set forth below is BLM's rationale for that denial:

The MUC [multiple use class] "C" area in which your operations are proposed is located outside of, but adjacent and contiguous to, Indian Pass Wilderness Study Area (WSA) CDCA - 355, which is also classified as MUC "C". Because your proposed area of operations is located in a MUC "C" area outside the WSA boundary, your PoO [plan of operations] was processed in accordance with provisions of 43 CFR 3809, in lieu of 43 CFR 3802 regulations which apply only to lands within a WSA.

When your PoO was filed, an environmental assessment (EA) was prepared in accordance with 43 CFR 3809.2-1. This office analyzed your proposal in the context of the requirement to prevent unnecessary or undue degradation to the public lands and to provide for reasonable reclamation procedures (see 43 CFR 3809.1-6(a)).

* * * * *

The BLM must manage the public lands in accordance with the DP [Desert Plan] which mandates a high level of protection for MUC "C" areas. We have concluded that your PoO is not in conformance with the DP since operations to be conducted under the PoO will result in unnecessary or undue degradation of the public lands. Our determination of unnecessary and undue degradation is based on the following three factors:

1. Based on the impacts as assessed in the EA prepared for your proposed operation, we have concluded that upgrading an existing way, construction of a new access road with associated cuts and fills, along with other proposed ancillary activities of a surface disturbing nature, will result in visual impacts in excess of guidelines established for this area under the BLM Visual Resource Management (VRM) system.
2. The proposed activities will also impair the suitability of the MUC "C" lands in the project area for inclusion into the National Wilderness Preservation System (NWPS). Reclamation of the road cuts, fills, and other associated surface disturbance can not be accomplished to a substantially unnoticeable condition by the reclamation deadline of June 30, 1989 (the date the Secretary of the Interior is expected to send his final wilderness recommendation on this area to the President of the United States).
3. Additionally, we have concluded that impairment of MUC "C" lands adjacent to WSA 355 will impair the manageability and suitability of the entire contiguous MUC "C" unit, comprised of lands recommended suitable for wilderness designation both within and adjacent to WSA 355.

Operations proposed within your PoO would cause unnecessary and undue degradation of the public lands which would be in nonconformance with the DP. The BLM is without authority to approve a PoO that is not in conformance with the DP. Therefore, your PoO, as submitted and evaluated, is denied.

(El Centro Resource Area Manager's Decision at 1-3).

By letter dated July 14, 1987, appellants appealed the Area Manager's decision to the State Director. See 43 CFR 3809.4. They argued, *inter alia*, that BLM is denying their "legal right of access" to their mining claims; that establishing a roadway as discussed during the April 27, 1987, field examination would not have the "visual impact as suggested" in BLM's decision; that its mining claims lie outside the National Wilderness Preservation Area; and that its plan of operations does not affect the entire area encompassed by Class C.

In his December 2, 1987, decision, the California State Director, BLM, affirmed the Area Manager's rejection of appellants' mining plan. He based his decision upon the following facts and findings:

1. The proposed project is located within the California Desert Conservation Area (CDCA). This area is given special recognition by Congress in Section 601 of the Federal Land Policy and Management Act and requires special management attention.
2. The CDCA is being managed under the guidelines of the CDCA plan, approved in 1980 by the Secretary of the Interior.
3. The proposed project site is located within lands identified as Class C (Controlled Use) on the CDCA Plan map and recommended as suitable for preservation as wilderness.
4. The proposed Plan of Operations would cause substantial adverse visual impacts from mining, road building, and related activity due to removal of vegetation, disturbance of topsoil, and disruption of the natural contours of the land.
5. The substantial adverse visual impacts would degrade existing wilderness values of naturalness. The visual impacts could not be mitigated prior to anticipated action of Congress by 1991 on the Bureau's recommendation.

Congress established a special standard of protection for lands in the CDCA. In order for that level of protection to be met for the area in question, the wilderness values must be preserved. The proposed Plan of Operations fails to adequately protect such value.

In their statement of reasons for appeal from the State Director's decision, appellants assert that they have requested information concerning the "determination criteria" applied to their plan of operations, and that other than copies of applicable regulations, no such information was sent

to them. They maintain that under the regulations sent to them, "specific guidelines" should have been developed "before determination[s] of this nature take place," but that "no specific guidelines have been developed for the area." ^{1/}

[1] Section 601(f) of FLPMA, 43 U.S.C. § 1781(f) (1982), provides:

Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within the California Desert Conservation Area shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. Any patent issued on any such mining claim shall recite this limitation and continue to be subject to such regulations. Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area. [Emphasis added.]

As noted, appellants' operations were proposed to take place in an area designated as "Class C," i.e., an area which had been "preliminarily recommended as suitable for wilderness designation by Congress" (CDCA Plan at 13). However, that area had not been formally designated as a WSA in accordance with section 603 of FLPMA, 43 U.S.C. § 1782 (1982). The fact that the area is designated as a Class C area, but not a WSA, appears to be at variance with the CDCA Plan, which contains the following description of the "methodology" to be used by BLM in implementing the "Wilderness Review Program:"

The BLM's Wilderness Review Program consists of three phases; the inventory phase, the study phase, and the reporting phase. * * *.

^{1/} By letter dated Apr. 15, 1988, Thomas filed a request under the Freedom of Information Act for the "visual impairment guidelines to prevent undue damage," as well as the "degradation guidelines" as mentioned in the Area Manager's decision. In response, the Acting District Manager, California Desert District, BLM, sent to appellants copies of the following documents: (1) the definition of unnecessary or undue degradation found in the regulations at 43 CFR 3809; (2) BLM Manual Sections H-8410-1 (Visual Resource Inventory) and H-8431-1 (Visual Resource Contrast Rating); (3) the June 19, 1987, Memorandum to the Geologist, El Centro Resource Area, entitled "Visual Resources Contrast Rating for the Price and Thomas 'Peg Leg's Other Leg' Claims Plan of Operation," in which the Lead Outdoor Recreation Planner, El Centro Resource Area, engages in a "visual resource contrast rating."

The inventory phase of the BLM's Wilderness Program in the CDCA began in April 1978 and ended in February 1979. It was a period of extensive field investigation and public involvement through public hearings and workshops and through written comments. As a result, 5.7 million acres of BLM-administered public lands were identified as Wilderness Study Areas (WSAs) because they met the criteria of Section 2(c) of the Wilderness Act of 1964.

Following the identification of WSAs, the Wilderness Program entered its second, or study, phase. In the study phase, which was conducted within the framework of the CDCA planning process, consideration was given to all resource values and opportunities, and a determination of "highest and best use(s)" for each WSA was made. The study-phase analysis led to preliminary recommendations for each WSA as suitable or unsuitable for wilderness designation by Congress. Those areas considered suitable for wilderness designation are represented as Multiple-Use Class C in this Plan. [Emphasis added].

(CDCA Plan at 53).

Our assumption, based upon the passages of the CDCA Plan just quoted, that in order to receive designation as a Class C area, that area must also have been identified as a WSA, is made clear by the following:

The Draft Plan Alternatives and EIS [Environmental Impact Statement], published in February 1980, presented the first preliminary wilderness suitability recommendations which varied according to the overall objectives for each alternative. Public comment on the Draft Plan Alternatives and new information were used to develop the wilderness suitability and unsuitability of preliminary recommendations appearing in this Plan. All or portions of 45 WSAs, totally about 2.1 million acres of public lands, are preliminarily recommended as suitable for wilderness, or Class C, while 92 areas are considered unsuitable.

With approval of this Plan, the reporting phase of the CDCA Wilderness Program commences. A wilderness study report consists of actually forwarding, or reporting, the recommendations on suitability or unsuitability for wilderness designation to the Secretary of the Interior. [Emphasis added.]

(CDCA Plan at 54).

In reviewing appellants' plan of operations, BLM personnel conducted three studies of the subject area. The first study concerned the wilderness characteristics of the Class C lands adjacent to WSA 355, and the potential impacts of appellants' operations upon the area. The results of this first study are contained in a Wilderness Input Memorandum dated June 19, 1987,

from the Lead Outdoor Recreation Planner of the El Centro Resource Area to the Geologist. This memorandum, in which BLM defines the framework within which it evaluated appellants' plan of operations, leaves unanswered the question of why the subject lands were designated Class C but not WSA:

The plan of operations area is located on part of a 997-acre area adjacent to the southwest boundary of WSA 355 which was placed in Class C by the Desert Plan as a result of information obtained during the wilderness study phase following the wilderness inventory completed on March 31, 1979. During the study phase, which covered the period from March 31, 1979 to completion of the Desert Plan in September, 1980, the Area Manager and staff of the El Centro Resource Area intensively studied and evaluated all WSAs in the Resource Area in order to develop suitable and unsuitable recommendations to be included in the Final Desert Plan. In the case of areas to be recommended suitable, a critical evaluation of potential wilderness boundaries was conducted in order to insure that all lands exhibiting wilderness qualities were included and that the boundaries of potential wilderness areas would be manageable.

As part of this process, the El Centro Area Manager, Area Wilderness Coordinator and Chief Area Ranger conducted an aerial survey of WSA 355 on July 16, 1980. Repeated passes were flown over potential boundary areas so that existing impacts could be accurately mapped in flight. Based on this overflight and the professional resource recommendations of Resource Area staff, the Area Manager developed recommendations for Class C (lands preliminarily recommended suitable for wilderness designation) boundaries. Included within the Area Manager's recommendation were 997 acres of lands outside but adjacent to the southwest boundary of WSA 355. The Area Manager's recommendation of these lands adjacent to the WSA was based on the conclusion that the lands did in fact exhibit the wilderness characteristics described in Section 2(c) of the Wilderness Act of 1964, and that the lands were manageable as wilderness. His Class C recommendation for WSA 355 and adjacent lands was incorporated into the Final Environmental Impact Statement and Proposed Plan and approved as part of the Final California Desert Plan.

The subject Class C lands adjacent to the WSA were not inventoried as having wilderness qualities through the wilderness inventory process conducted under provisions of Section 603 of FLPMA. The lands are therefore not a part of the WSA and are not subject to the nonimpairment mandate of FLPMA Section 603(c). Likewise, the lands are not subject to the provisions of 43 CFR 3802 regulations. However, the lands were evaluated and found to be suitable for wilderness designation through the Desert Plan process, which was a land-use planning process conducted under provisions of Sections 202 and 601 of FLPMA.

* * * * *

[T]he California Desert Plan, which was prepared according to the Congressional guidance contained in Section 601 of FLPMA, found the subject Class C lands adjacent to WSA 355 as suitable for wilderness designation. The suitability determination was based on an intensive analysis of resource and use data, and public involvement. Due consideration was given to other, nonwilderness, land uses at the time. The Desert Plan "Section 202" suitability recommendation clearly established the preservation of wilderness values as a primary BLM management objective on these lands. During the evaluation of any proposed action, careful consideration must be given to protection of those values, both within the area of operations and on lands outside the area of operations, including lands within WSA 355, which may be affected by those operations.

(Wilderness Input Memorandum at 1-2).

Because the lands affected by appellants' plan of operations were preliminarily recommended by the CDCA Plan as suitable for wilderness designation by Congress, and remain under review, it would seem reasonable to evaluate their plan of operations under the regulations at 43 CFR Subpart 3802, which were promulgated to "establish procedures to prevent impairment of the suitability of lands under wilderness review for inclusion in the wilderness system and to prevent unnecessary or undue degradation by activities authorized by the U.S. Mining Laws." 43 CFR 3802.0-1; see section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1982). In fact, the CDCA Plan indicates that mining operations on Class C lands will be governed by 43 CFR Subpart 3802. See CDCA Plan at 55.

However, the regulations require that the Class C lands involved in this appeal are to be managed under 43 CFR Subpart 3809. Those regulations were promulgated to "establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 CFR 3809.0-1. The term "Federal lands" is defined at 43 CFR 3809.0-5(c) to exclude "lands under Wilderness Review and administered by the Bureau of Land Management (these lands are subject to the 43 CFR [Sub]Part 3802 regulations)." Thus, lands in the CDCA which are not subject to wilderness review are governed by the regulations at 43 CFR Subpart 3809.

While we remain puzzled why the lands affected by appellants' operations received Class C designation but were not included in a WSA, we conclude that the regulations in 43 CFR Subpart 3809, as interpreted and applied by BLM in this case, afford the affected lands the protection contemplated under section 601 of FLPMA, 43 U.S.C. § 1781 (1982). Those regulations provide that "[a]n approved plan of operations is required prior to commencing * * * [a]ny operation, except casual use, in * * *

[l]ands in the California Desert Conservation Area designated as 'controlled' or 'limited' use areas by the California Desert Conservation Area plan," i.e., Class C or Class L lands. 43 CFR 3809.1-4(b)(1). BLM's authorized officer is required under 43 CFR 3809.1-6(a) to evaluate a plan of operations "in the context of the requirement to prevent unnecessary or undue degradation and provide for reasonable reclamation." The phrase "unnecessary or undue degradation" is defined at 43 CFR 3809.0-5(k) to mean

surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met. [Emphasis added.]

As noted, section 601(f) of FLPMA required BLM to promulgate regulations which would provide for measures to protect the scenic, scientific, and environmental values of the public lands of the CDCA against "undue impairment." The regulations actually promulgated by BLM do not define "undue impairment" as that term is used in section 601(f) of FLPMA, but simply provide, at 43 CFR 3809.0-5(k), that "that level of protection shall be met." In adopting the regulations at 43 CFR Part 3800, BLM observed that "[s]everal comments were received that suggested the promulgation of a separate rulemaking for the California Desert Conservation Area." 45 FR 78902, 78909 (Nov. 26, 1980). BLM rejected the suggestion of a separate rulemaking, stating that

[t]he final rulemaking includes provisions that will afford the area adequate protection.
* * * The final rulemaking requires the filing of a plan of operations for any activity in the California Desert Conservation Area beyond that covered by casual use. The plan would be evaluated to ensure protection against "undue impairment" and against pollution of the streams and waters within the Area.

Id. at 78909.

Under 43 CFR 3809.0-5(k), a plan of operations must take "into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations" (emphasis added). Furthermore, a plan of operations affecting lands in the CDCA must

take into consideration the specific objectives of section 601(f) of FLPMA, i.e., protecting the scenic, scientific, and environmental values of the affected lands against undue impairment, and to assure against pollution of affected streams and waters. As promulgated by BLM, the general standard contained in the definition of "unnecessary or undue degradation" is to be applied to CDCA lands in accordance with the imperatives of section 601(f) of FLPMA.

While BLM felt constrained not to evaluate the plan of operations under 43 CFR Subpart 3802, which apply to "mining operations * * * as they affect the resources and environment or wilderness suitability of lands under wilderness review (43 CFR 3802.0-7(a))," BLM was required by 43 CFR 3809.0.5(k) to consider the impacts of the proposed operations upon WSA 355. Thus, as discussed below, BLM applied the regulations at 43 CFR Subpart 3809 with particular attention to whether the proposed mining operations would affect WSA 355, as well as to whether the operations would result in the "undue impairment" of the wilderness characteristics of the lands directly affected.

BLM concluded that the results of appellants' proposed project would be "substantially noticeable" within the Class C lands adjacent to WSA 355, as well as from vantage points within WSA 355 (June 19, 1987, Wilderness Input Memo, supra at 5). According to BLM, "[t]he most visible contrasts created by the project will be line and color contrasts created by construction of the access road. Much of the area affected by the plan is covered by a dark surface of desert pavement which is underlain by lighter surface material." Id. Additionally, "[t]he three major roadcuts will produce significant cuts and fills, creating noticeable man-made benches and slopes interrupting the natural washbank." Id.

BLM provided the following reasons for concluding that appellants' proposed mining operation would "impair the wilderness suitability of the Class C lands adjacent to WSA 355":

While lands outside WSAs are not subject to the nonimpairment standard of the IMP [Interim Management Policy and Guidelines for Lands Under Wilderness Review Chapter I.A.5.], 3809 regulations direct that the effects of proposed operations on resources and uses outside the area of operations be considered in the determination of unnecessary or undue degradation. As stated previously, the impacts of the operation will be substantially noticeable from vantage points within WSA 355, as well as in the Class C lands adjacent to it. In addition, the Class C boundary as established by the California Desert Plan was identified not only to enclose all lands possessing wilderness qualities, but also to establish boundaries which optimize manageability of the recommended suitable wilderness lands. By creating impacts substantially noticeable from within WSA 355 and by impairing wilderness suitability within WSA 355 and by impairing wilderness suitability within a portion of the Class C

boundary (which defines the boundary of optimum wilderness manageability) the proposed operation will impair the wilderness suitability of the total contiguous Class C unit, comprised of lands both within and adjacent to WSA 355.

(June 19, 1987, Wilderness Input Memorandum, supra at 7).

In addition, BLM conducted a Visual Resources Contrast Analysis for appellants' plan of operations in accordance with BLM's VRM procedures. The stated "objective of the analysis was to define whether or not the proposed mining operations would be 'substantially unnoticeable' within the context of wilderness interim management" (Visual Resources Contrast Analysis at 1). The plan of operations area was evaluated under the following criteria:

The plan of operations area, which is located within the Indian Pass Area of Critical Environmental Concern as well as within a Class C area, has been assigned to VRM Class II. Class II contrast guidelines specify that changes in any of the basic visual elements (form, line, color, and texture) caused by a management activity "should not be evident in the characteristic landscape. The contrast may be seen, but must not attract attention." In quantitative terms, a maximum element contrast of "Moderate" (2x) is allowable, with a maximum feature contrast of 12. A management action which meets these contrast limit guidelines should also meet the definition of "substantially unnoticeable" contained in the BLM Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), which refers to "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being man-made or man-caused."

(Visual Resources Contrast Rating at 1).

The Recreation Planner selected four "critical viewpoints," three of which are situated within the Class C lands adjacent to WSA 355, and one which is situated within WSA 355. He prepared "visual contrast rating worksheets" for each viewpoint, "based on the expected appearance of the operational area on June 30, 1989, the date the Secretary of the Interior is scheduled to make the final Departmental recommendation to the President on suitability of the affected lands for wilderness designation." Id. at 2. He concluded that "the project would create visual contrasts in excess of VRM Class II guidelines. The resulting visual impacts would be substantially noticeable on June 30, 1989, from all critical viewpoints, even with prescribed reclamation measures. The primary cause of excessive contrasts is road construction." Id. at 3.

We conclude that the record supports BLM's decision rejecting appellants' plan under 43 CFR Subpart 3809 on the basis that their proposed operations would result in undue impairment of the wilderness characteristics of WSA 355 and of the lands directly involved and that appellants have not demonstrated the decision is erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge